

IN THE SUPREME COURT OF THE STATE OF MISSOURI

MARY CATHERINE LOWDERMILK,
Individually and as the Representative of
the Estate of Gregory A. Lowdermilk,

Plaintiffs/Appellants,

v.

VESCOVO BUILDING AND REALTY,
COMPANY, INC., GARY VESCOVO,
ROBERT VESCOVO, GUNDAKER
REAL ESTATE COMPANY, INC.,
LARRY D. WILSON, JR. AND BETH
GUNDAKER-LISK,

Defendants/Respondents.

No. SC84737

On Transfer from the Missouri Court of Appeals,
Eastern District of Missouri
ED 79055

**SUBSTITUTE BRIEF OF RESPONDENTS VESCOVO BUILDING AND
REALTY COMPANY, INC., GARY VESCOVO AND ROBERT VESCOVO**

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JURISDICTIONAL STATEMENT

The Vescovo Respondents respectfully contest the jurisdiction of this Court to review the issues raised by Appellants in Points Relied On IV and V of their Substitute Brief which are addressed to the Vescovo Respondents because Appellants did not raise these issues in their court of appeals brief as required by Rule 83.08. Since Appellants did not raise “reasonableness” of the verdict (Point Relied On IV) nor “acceptance of responsibility” for other alleged defects (Point Relied On V), Appellants may not now alter the basis of claims raised in the court of appeals under Rule 83.08.

Appellants have further failed to invoke the jurisdiction of this Court to review the court of appeals decision as to the Vescovo Respondents, because these issues do not involve the grounds for transfer set forth in Rules 83.02 and 83.04. These rules provide that a transfer may be ordered when issues in a case involve a question of general interest or importance, are for the purpose of re-examining existing law, or the court of appeals opinion is contrary to a previous decision of an appellate court of this state.

Sections 339.710-339.860 apply to realtors, not to builders. Appellants’ assertion in their Substitute Brief that this Court transferred this case “to determine issues of general interest and importance related to the legislature’s enactment of Missouri Revised Statutes §§339.710 - 339.860” expressly shows that Appellants requested transfer to have this court review issues pertaining to Gundaker, not Vescovo. The three issues raised in Appellants’ Suggestions in support of their Application for Transfer affect only the Gundaker Respondents. Whether Sections 339.710-339.860 provide a private cause of action, whether a negligence per se claim is permitted for purely economic loss and whether a cause of action for negligent omission exists in Missouri each relate solely to the

Gundaker Respondents. The Vescovo Respondents are not mentioned in Appellants' Application to Transfer.

Points Relied On IV and V of Appellants' Substitute Brief (the only Points Relied On addressed to the Vescovo Respondents) do not involve issues which would invoke this Court's jurisdiction. The only issues addressed to the Vescovo Respondents in Appellants' Substitute Brief are whether the jury's award was reasonable (Point Relied On IV) and whether they "accepted responsibility" for other alleged defects (Point Relied on V). Neither issue is of general interest or importance, nor needs re-examination of existing law. There is no court of appeals decision on these issues contrary to a previous appellate court decision because these issues were not raised in the court of appeals. These issues cannot now be raised on transfer because Rule 83.08 requires that the party requesting transfer not alter the basis of any claim raised in the court of appeals.

The trial court sustained the Vescovo Respondents' Motion for a New Trial on the grounds that Appellants' verdict directors 7, 8, and 9 limited the jury to finding whether or not the Vescovo Respondents failed to disclose that the exterior of the foundation had not been damp-proofed and whether or not, as a direct result of such failure, Appellants were damaged. (L.F. 423). Finding that the jury was "allowed to consider other claimed defects in the home, the existence of which were not submitted by Plaintiffs' verdict directing instructions," the trial court sustained the Vescovo Respondents' new trial motion. (L.F. 423-4).

In Part I of its opinion, the court of appeals affirmed the trial court's order sustaining the Vescovo Respondents' Motion for New Trial. Although Appellants' verdict directing instructions 7, 8, and 9 limited the jury to finding whether or not Vescovo Respondents' actions amounted to "the

failure to disclose the failure to damp-proof,” Appellants’ damage instruction (MAI 4.03), used over Vescovo’s objection, was found to be misleading because “... Plaintiffs’ damage instruction did not direct the jury, in determining “actual value”, to eliminate all reductions in value other than those resulting from the failure to disclose the lack of damp-proofing.” Thus, Appellants’ version of 4.03 failed to limit the jury’s consideration of damages to those damages caused by failure to disclose that the foundation had not been damp-proofed. Therefore, the court of appeals found it was error to give Appellants’ damage instruction without modification and that the Vescovo Respondents were prejudiced by the failure to appropriately modify it. The court of appeals held that the trial court did not abuse its discretion nor misapply the law in granting a new trial because the jury was allowed to consider improper damage evidence.

Part II of the court of appeals opinion, discussing negligence per se as it applied to the Gundaker Respondents, does not pertain to the Vescovo Respondents.

Appellants seek this Court’s review of Points Relied On IV and V without satisfying the jurisdictional requirements that the issues be previously raised in the court of appeals and in addition, be of general interest or importance, for the purpose of re-examining existing law or because the court of appeals opinion is contrary to a previous appellate decision. Accordingly the Vescovo Respondents suggest that this Court is without jurisdiction to consider the issues raised in the Points Relied On IV and V.

Having lodged these jurisdictional objections, the Vescovo Respondents submit this Substitute Brief responding to Appellants' Points Relied On IV and V, raising the jurisdictional issues in Point Relied On VI and mootness in Point Relied On VII. (Appellants' Points Relied On I, II, and III do not apply to the Vescovo Respondents).

STATEMENT OF FACTS

Generally

The Vescovo Respondents agree with, and pursuant to Missouri Rule of Civil Procedure 84.04(f) hereby adopt much of Appellants' Statement of Facts. However, Appellants have either misstated or omitted several relevant, material facts. The Vescovo Respondents are therefore not satisfied with Appellants' Statement of Facts. Even if, as alleged in footnote 1 of their Brief, Appellants are entitled to set forth facts "in a light most favorable to the jury's verdict," Respondents are compelled to call this Court's attention to these omissions and misstatements. Those additions and corrections are as follows:

I. Construction of the house at 118 Glen Road

The Vescovo Respondents agree that Appellants owned the property and built the home at 118 Glen Road. Trial Transcript ("Tr.") III-V at 341-346¹. The Vescovo Respondents also agree that during the construction of the home, the foundation was not damp-proofed. Tr. III-V at 357. This failure to damp-proof the home's foundation, however, was unknown to either Robert or Gary Vescovo. Tr. III-V at 357. Robert was out of town at the time the foundation was back-filled. He believed Gary had taken care of the damp-proofing and Gary assumed Robert had done so. Tr. III-V at 358-359. Furthermore, Webster Groves Building Inspector Mike Harney issued a code compliance certificate and an occupancy permit for the home after being informed that its foundation had not been

¹Respondents, for consistency in its Brief to this Court, will adopt the same citation designations used

by Appellants.

damp-proofed. Tr. 9/27/00 at 27-28. Robert Vescovo acknowledged to Appellants that the foundation had not been damp-proofed shortly after the Vescovos discovered it had not been done. Tr. III-V at 386. The Vescovo Respondents offered both orally and in writing to damp-proof the home at 118 Glen Road. Tr. III-V at 388-390; Legal File Exhibits (L.F. EXH) at 212. Appellants refused to allow this and demanded that the Vescovo Respondents “buy back” the house. Tr. III-V at 389.

Regarding other alleged “errors and omissions” in the construction of the house, Respondents objected to the admission of any evidence regarding allegations of defects not discoverable on the date of the sale of the home as being irrelevant to the issue of the Vescovo Respondents’ construction of the house. Tr. 9/27/00 at 37-42. The trial court overruled these objections and that evidence was admitted. Tr. 9/27/00 at 42. Appellants originally pleaded seven counts against Respondents including breach of implied warranty, negligence per se, intentional misrepresentation, negligent omission and unjust enrichment. L.F. Vol. I at 26-64. At the conclusion of the trial, Appellants proceeded to the jury only on the issue of the Vescovo Respondents’ negligent failure to disclose that the house had not been damp-proofed. No other issue was presented to the jury. L.F. III at 305-307, (verdict directors 7, 8 and 9 against the Vescovo Respondents).

Because Appellants were allowed to introduce evidence of alleged defects other than the failure to damp-proof, the Vescovo Respondents were required to introduce rebuttal evidence in their case. Respondents’ rebuttal evidence consisted of the testimony of Robert Vescovo and other witnesses. Respondents’ rebuttal evidence included evidence that the Vescovo Respondents agreed to put “felt” or tar paper under the shingles on only some parts of the roof. This only occurred because Robert Vescovo was told by a person in the office of the Webster Groves building inspector

(the inspector's administrative secretary) that Webster Groves' requirements regarding felt on a roof were the same as those of St. Louis County. Tr. III-V at 361-362. Robert Vescovo was familiar with St. Louis County requirements in this regard, and followed them accordingly. Tr. III-V at 359-362.

Appellants misstate the facts regarding the Vescovo Respondents' failure to properly support the wall of the house between the home and the garage. There was no evidence adduced which proved this occurred. Appellants' expert's math regarding wall load in this area was incorrect by a factor of ten in Appellant's favor. His calculations and opinions in this regard are suspect at best. Also, Robert Vescovo testified that this wall was fully supported by three concrete piers. Tr. III-V at 420-422. Eugene Brucker, a geological engineer, testified for the Vescovo Respondents and stated that in his two inspections of the house at 118 Glen Road, he found the home's foundation to be in excellent condition, with no evidence of settling. Tr. III-V at 150-152, 163. He further testified that the wall in question had dropped only a minor amount, and could be permanently repaired by mudjacking under the floor of the garage beneath that wall. Tr. III-V at 167-168. Pat Lloyd, the architect who designed the home, testified that she saw nothing with respect to the stairs or I-Beams in the basement of the home that caused her any concern. Tr. III-V at 220-221. Finally, though the small front porch was properly installed, a backfill problem caused the porch to settle. Tr. III-V at 368-369. That problem, Robert Vescovo testified and Mr. Brucker confirmed, could be repaired by simply jacking up the porch and adding a new support pier. Tr. III-V at 181-182.

Appellants allege a conversation between Robert Vescovo and the backhoe operator who backfilled the foundation of the 118 Glen Road house which was adduced as evidence over objection

(Tr. 9/27/00 at 230-231). They allege that the backhoe operator told Robert Vescovo that the foundation had not been damp-proofed but that the backfill occurred anyway. Appellants fail to mention, however, that the alleged observer of the conversation was fifty feet away, with eight foot shrubs partially obscuring his view of the conversation. Tr. 9/27/00 at 240-243. Furthermore, this witness was unable to hear a conversation of similar volume in the courtroom from the same distance. Tr. 9/27/00 at 242-243. Finally, Mike Hulsey, the backhoe operator who backfilled the foundation, denies that such a conversation took place, or that Robert Vescovo was even on the property the day the backfill occurred. Tr. III-V at 125-128.

II. Mr. Kiernan's Letters

Appellants fail to mention in this section of their argument, that Mr. Kiernan, a gentleman who lived four (4) blocks from the 118 Glen Road house, entered onto that property without the permission of the owners. Tr. I-II at 368, 395, 401, 407, 408; III-V at 356. Moreover, Mr. Kiernan denied at trial a statement he made to Ted Thornhill of Janet McAfee Realtors that “a lawsuit will occur later.” Tr. I-II at 487-493.

III. Gundaker's Representation of the Vescovo Respondents

The Vescovo Respondents agree with and adopt the Statement of Facts in this section of Appellants' Brief.

IV. Gundaker's Receipt of the Letter from Mr. Kiernan

The Vescovo Respondents agree with and adopt the Statement of Facts in this section of Appellants' Brief.

V. Appellants' Purchase of the House

Appellants state that “at no time did the Vescovo Respondents ... notify Appellants that the exterior of the foundation had not been damp-proofed”. This is a misstatement of fact. The evidence adduced at trial clearly shows that the Vescovo Respondents told the Appellants about their failure to damp-proof the foundation shortly after they learned of the omission. Tr. I-II at 286; III-V at 384-387. Further, though Robert Vescovo did not tell Appellants about Mr. Keirnan’s letter, he told Ted Thornhill of Janet McAfee Realtors to disclose it to any buyer. Tr. III-V at 417-418. Gary Vescovo told Gundaker agent Larry Wilson about the letter prior to the sale of the home to Appellants. Tr. III-V at 480.

VI. The Lawsuit

The Vescovo Respondents agree and are satisfied with the Statement of Facts in this Section of Appellants’ Brief. The Respondents state further, however, that Appellants’ Petition made seven claims against the Vescovo Respondents. These included claims for breach of implied warranty, negligence per se, intentional misrepresentation, fraudulent omission, negligent misrepresentation, negligent omission and unjust enrichment. L.F. Volume I at 26-64. Until the time of trial, Appellants were asking for equitable relief, that is, rescission of the contract whereby the Vescovo Respondents would buy the home back from Appellants. L.F. Volume I at 26-64. It was not until the time of trial that Appellants elected to pursue monetary damages rather than rescission of the sale contract. L.F. Volume I at 19. When the parties made suggestions regarding jury instructions, the issues applicable to the Vescovo Respondents were narrowed to whether they had negligently concealed their failure to damp-proof the foundation of the house. Legal File (L.F. Volume III at 305). Finally, the Vescovo Respondents moved for directed verdict at the close of Appellants’ case and at the close of all

evidence. Tr. III-V at 123 and 576-577.

VII. Alleged Errors and Omissions in the Construction of the House

The first allegation by Appellants in this section is a misstatement of the evidence adduced at trial. Appellants state, “until the code violations were corrected at this house, ... the City of Webster Groves refused to issue an occupancy permit” and cites Tr. 9/27/00 at 13 as the location of the evidence in this regard. Appellants’ Brief p. 16.

First, there is to be found nowhere in the record, evidence that any alleged code violations were ever corrected by Appellants, or, that the City of Webster Groves ever refused to issue an occupancy permit. The evidence cited by Appellants consists of the testimony of the Webster Groves Building Inspector. The question asked by Appellants’ attorney was: “What effect will these violations have on a certificate of occupancy, if Cathy wants to sell the house?” The answer given: “... If those are code requirements, the City is obligated to make sure that those mechanisms are in place.” Tr. 9/27/00 at 13. In fact, however, an occupancy permit was issued for 118 Glen Road even after Mr. Harney was made aware by a neighbor, Bill Buchanan, that the home’s foundation had not been damp-proofed. Tr. 9/27/01 at 30, 243-245, 247. Webster Groves Building Inspector, Mr. Harney testified about a “variance” procedure through which alleged building code violations could be reviewed and an occupancy permit issued if, among other circumstances, “an equivalent form of construction is to be used.” Tr. 9/27/00 at 15-16.

Finally, Mr. Harney admitted that he did not know what his secretary was telling builders who called with questions and that, even though the City of Webster Groves found some building issues

with the home at 118 Glen Road, those issues were corrected and an occupancy permit was issued. Tr. 9/27/00 at 21-23.

The second misstatement in this section occurs because Appellants discuss the improvements that were allegedly required and seemingly accomplished prior to trial in order for Webster Groves to issue an occupancy permit. For example, Appellants state that, “To damp-proof the exterior of the foundation at this stage required that the dirt from around the foundation be excavated and cleaned before damp-proofing material could be applied.” Appellants’ Brief P.16. (Emphasis added). Appellants speak of all alleged necessary repairs in the past tense, as if they had been done at the time of trial. Nowhere in the record, however, is there evidence that Appellants made any of the repairs allegedly required. As a matter of fact, Appellant Cathy Lowdermilk testified that the only “problems” Appellants fixed prior to trial were to recaulk the master bath shower and to have extensive landscaping done. The landscaping, she stated, was partially “decorative” and partially because grass would not grow. Tr. I-II at 293-295.

VIII. Damages Alleged by Appellants

The evidence Appellants cite to prove the allegations of “fact” in this section is made up completely of the testimony of their expert, architect Mr. Matthew Foreman, who had prior to this trial, never been qualified as an expert witness and whose math regarding the alleged improperly constructed wall support was incorrect by a factor of ten, to Appellants’ advantage. Tr. 9/27/00 at 99; Tr. III-V 420-422. Additionally, Mr. Foreman admitted that he changed his “cost to repair” estimates on the home twice from his original estimate. Particularly, in his original estimate the cost of the correction of the lack of damp-proofing was \$15,000.00. At trial, that cost jumped to \$27,800.00.

Tr. 9/27/00 at 197 and III-V at 45. Mr. Foreman also admitted, regarding the charge of \$8,500.00 for architect's fees, that it was not an exact number. Further, he could not quantify the manner in which the change was calculated. Tr. 9/27/00 at 117-119.

Appellants fail to cite the differing opinion of Robert Vescovo, owner of a construction business, regarding whether or not the perceived problems Mr. Foreman saw were actually problems and when they became problems. As stated above, Mr. Vescovo testified that the allegedly unsupported wall was actually supported by three concrete piers. Tr. III-V at 420-422. Further, Mr. Vescovo testified that the porches, which shifted after purchase by Appellants, did not need to be removed, but could be repaired for \$500.00 by being jacked up and supported while new concrete piers were poured for support. Tr. III-V at 395. Also, Eugene Brucker, testified that the porches could be fixed in three to four hours by jacking them up and installing new piers. Tr. III-V at 181-182.

Regarding Susan Schiff, Appellants' real estate "expert," Appellants fail to mention the following in their Brief:

- a) Ms. Schiff's opinion regarding the value of 118 Glen Road house with alleged defects changed several times during the course of the case. Tr. III-V at 25-26;
- b) This change in opinion is attributable to and based on changes in Mr. Foreman's "cost of repair figure." Tr. III-V at 26; 65; This "cost of repair figure" was the sole basis for her opinion of the home's value. Tr. III-V at 32;
- c) Ms. Schiff agreed that a math error in Mr. Foreman's calculations would effect her

opinion. Tr. III-V at 26-27; 32-33;

- d) Ms. Schiff agreed that access to the crawl space was not a hidden defect. Tr. III-V at 67;
- e) Ms. Schiff also agreed that as a real estate agent, she would not feel the need to disclose the absence of Tyvek house wrap nor the absence of felt underlayment on the roof. Tr. I-II at 43;
- f) Ms. Schiff testified that she has done no other evaluations of fair market value other than to rely on Mr. Foreman's opinions. Tr. III-V at 59-60, 65, 73, 77-78;
- g) Ms. Schiff stated that the value of the home in November, 1999 would have been the purchase price minus the cost of repairs per Mr. Foreman at that time, minus 10%. She then testified that the 10% devaluation was not proper in this case because she admitted that if the repairs were made, there would be no loss of value. Tr. III-V at 112; and
- h) Ms. Schiff was of the opinion that the property at 118 Glen Road alone was worth \$200,000.00.

Furthermore, Dennis Radmer, Respondents' real estate expert, expressed the opinion that Susan Schiff's method of arriving at the value of the home at the time of sale was "ridiculous". Tr. III-V at 299-300.

IX. Jury Instructions and Closing Argument

The Vescovo Respondents agree that the verdict directed to the jury was as set forth in Appellants' Brief.

The Vescovo Respondents submitted a version of MAI 4.03, refused by the trial court, which stated as follows:

If you find in favor of the Plaintiffs, then you must award Plaintiffs such sum as you believe was the difference between the actual value of the residence on the date it was sold to Plaintiffs and what its value would have been on that date had the failure to waterproof been disclosed by Defendants. (L.F. 325).

Further, Respondents objected to the use of Appellants' version of MAI 4.03 based on its overbreadth. Tr. III-V at 589. Appellants' version stated:

If you find in favor of the plaintiffs, then you must award plaintiffs such sums as you believe was the difference between the actual value of the house on the date it was sold to plaintiffs and what its value would have been on that date had the house been as represented by defendant. L.F. at 312.

Respondents never objected, however, to the use of some version of MAI 4.03.

Regarding the Vescovo Respondents' alleged failure to object to Appellants' closing argument and what the jury should award, Appellants again misstate the facts to the Court. The Vescovo Respondents' attorney did object to this statement by Appellants and the objection was overruled. Tr. III-V at 605. Finally, Appellants recount a part of the Vescovo Respondents' closing argument, but not all of it. In their closing argument, the Vescovo Respondents' attorney spoke at length about the unbelievability of Mr. Kiernan's testimony and the incredibility of Mr. Buchanan's. She also discussed architecture expert Mr. Forman's incorrect calculations. Most importantly, the Vescovo Respondents' closing sets forth clearly that the largest amount of damages for which they could possibly be responsible, even if evidence of all alleged defects was properly considered by the jury, was Eighty-two Thousand Dollars, (\$82,000.00). Tr. III-V at 626.

X. Jury verdict

The Vescovo Respondents agree generally with the substance of this section of Appellants' Brief. However, by way of clarification, the Vescovo Respondents were found liable by the jury for "negligent concealment." L.F. 305.

Further, the Vescovo Respondents, in their Motion for Judgment Notwithstanding the Verdict or For a New Trial, alleged many errors on the part of the trial court. Appellants list only that error upon which the trial court granted Respondents' motion for a new trial. The new trial was granted because the jury was improperly allowed to consider other claimed defects in the home which were not submitted in Appellants' verdict directors 7, 8 and 9. L.F. 344-350; 423-424.

XI. Subsequent Sale of Home

Evidence adduced since the date of the trial indicates that Appellants sold the house at 118 Glen Road on or about August 16, 2001, for a sale price of Six Hundred and Twenty Thousand Dollars (\$620,000.00). (Supplemental Legal File Volume IV at 1-2. Appendix A1-2).

XII. Court of Appeals Opinion Affirming Trial Court Order Sustaining the Vescovo Respondents' Motion for a New Trial

In Part I of its opinion, the court of appeals affirmed the trial court's order sustaining the Vescovo Respondents' Motion for a New Trial. The trial court had granted the new trial on the grounds set forth in Paragraph 10(b) of the Vescovo Respondents' motion in that Appellants' damage instruction 4.03 improperly allowed the jury to consider claimed defects, other than lack of waterproofing, which were not submitted in Appellants' verdict directing instructions 7, 8, and 9. The court of appeals held that Plaintiffs' damage instruction was misleading because it did not direct the jury, in determining "actual value," to eliminate all reductions in value other than those resulting from the failure to disclose the lack of damp-proofing. For this reason, it was error to give the damage instruction without modification. The court of appeals further found that the Vescovo Respondents had objected to admission of evidence of alleged defects other than waterproofing. The court of appeals held that they were not required to request a withdrawal instruction when such other alleged defects were admitted as relevant on other counts of the Petition on which the case was tried, but not submitted, to the jury. The court of appeals found it was error to permit the jury to consider evidence and award damages beyond the scope of the verdict directors. The court of appeals held that the trial court did not abuse its discretion, nor misapply the law, in granting a new trial on the grounds that the jury was allowed to consider improper damage evidence. Lowdermilk, et. al. v. Vescovo Building and

Realty Company, Inc. et al., E.D. 79055 (June 18, 2002).

(Part II of the court of appeals opinion dealing with the negligence per se issue as it applies to the realtor Defendants does not apply to the Vescovo Respondents.)

POINTS RELIED ON

I, II, III. VESCOVO RESPONDENTS WILL NOT RESPOND TO APPELLANTS' POINTS RELIED ON I, II, AND III, AS THESE POINTS RELIED ON ARE ADDRESSED SOLELY TO THE GUNDAKER RESPONDENTS AND DO NOT PERTAIN TO THE VESCOVO RESPONDENTS.

IV. THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S ORDER GRANTING ALL RESPONDENTS A NEW TRIAL BECAUSE THE JURY'S AWARD OF \$140,000.00 IN COMPENSATORY DAMAGES SHOWED THAT THE JURY DID CONSIDER OTHER ALLEGED DEFECTS BESIDES FAILURE TO DAMP-PROOF IN THAT THE AWARD APPEARS TO APPROXIMATE THE REVISED ESTIMATE OF APPELLANTS' EXPERT FOR ALL ALLEGED

DEFECTS, IN ADDITION TO THAT OF THE ALLEGED FAILURE TO DAMP-PROOF, AND THEREFORE WAS NOT SUPPORTED BY A REASONABLY RATIONAL BASIS.

Parker v. Pine, 617 S.W.2d 536 (Mo. App. W.D. 1981)

Seidel v. Gordon A. Gundaker Real Estate Co., 904 S.W.2d 357 (1995)

Schnuck v. Kreigshauser, 371 S.W.2d 242 (Mo. 1963)

Wassen v. Schubert, 964 S.W.2d 520 (Mo. App. W.D. 1998)

V. THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S ORDER SUSTAINING THE VESCOVO RESPONDENTS' MOTION FOR NEW TRIAL ON THE GROUND THAT APPELLANTS' DAMAGE INSTRUCTION IMPROPERLY ALLOWED THE JURY TO CONSIDER OTHER CLAIMED DEFECTS WHICH WERE NOT SUBMITTED BY APPELLANTS IN VERDICT DIRECTING INSTRUCTIONS 7, 8, AND 9 WHICH LIMITED THE JURY'S CONSIDERATION TO

ONLY THOSE DAMAGES CAUSED BY THE FAILURE TO DAMP-PROOF. WHETHER OR NOT THE VESCOVO RESPONDENTS PURPORTEDLY “ACCEPTED RESPONSIBILITY” FOR TWO ADDITIONAL CODE VIOLATIONS AND A SLOPING PORCH IS IRRELEVANT FOR THE REASON THAT THESE OTHER ALLEGED DEFECTS WERE NOT SUBMITTED IN APPELLANTS’ VERDICT DIRECTORS 7, 8, AND 9 AND THUS WERE OUTSIDE THE PROVINCE OF THE JURY’S CONSIDERATION.

Bodimer v. Ryan’s Family Steakhouses, Inc., 978 S.W.2d 4

(Mo. App. E.D. 1998)

Rains v. Herrell, 950 S.W.2d 585 (Mo. App. S.D. 1997)

VI. APPELLANTS HAVE FAILED TO INVOKE THE JURISDICTION OF THIS COURT AS TO THE VESCOVO RESPONDENTS BECAUSE THEIR POINTS RELIED ON IV AND V ALTER THE BASIS OF CLAIMS RAISED IN THEIR COURT OF APPEALS BRIEF IN VIOLATION OF RULE 83.08 IN THAT APPELLANTS DID NOT RAISE “REASONABLENESS” OF THE VERDICT NOR “ACCEPTANCE OF RESPONSIBILITY” FOR OTHER ALLEGED DEFECTS IN THAT BRIEF. FURTHERMORE, THESE ISSUES DO NOT MEET THE TRANSFER REQUIREMENTS OF RULES 83.02 AND

83.04 BECAUSE THEY DO NOT INVOLVE QUESTIONS
OF GENERAL INTEREST OR IMPORTANCE, ARE NOT
FOR THE PURPOSE OF RE-EXAMINING EXISTING
LAW AND THE COURT OF APPEALS OPINION
GRANTING THE VESCOVO RESPONDENTS A NEW
TRIAL IS NOT CONTRARY TO A PREVIOUS DECISION
OF AN APPELLATE COURT OF THIS STATE.

Linzenni v. Hoffman, 937 S.W.2d 723 (Mo. banc 1997)

Missouri Rule of Civil Procedure 83.02

Missouri Rule of Civil Procedure 83.04

Missouri Rule of Civil Procedure 83.08

VII. THE COURT SHOULD DISMISS THIS TRANSFER BECAUSE THE APPELLANTS' CAUSE OF ACTION IS MOOT, IN THAT THEY SOLD THE HOUSE FOR \$60,000.00 MORE THAN THE PURCHASE PRICE, SO APPELLANTS SEEK A JUDGMENT UPON A MATTER WHICH, IF A JUDGMENT WERE RENDERED, WOULD NOT HAVE ANY EFFECT UPON ANY THEN EXISTING CONTROVERSY AND ANY JUDGMENT RENDERED WOULD BE A HYPOTHETICAL OPINION.

Bratton v. Mitchell, 979 S.W.2d 232 (Mo. App. W.D. 1998)

Citizens Safe Waste Management v. St. Louis County Air Pollution,

896 S.W.2d 643 (Mo. App. W.D. 1995)

Reed v. Reardon, 41 S.W.3d 470, 472 (Mo. 2001)

State ex rel. Missouri Cable Television Association v.

Missouri Public Service Commission, 917 S.W.2d 650

(Mo. App. W.D. 1996)

ARGUMENT

I-III. THE VESCOVO RESPONDENTS WILL NOT RESPOND TO APPELLANTS' POINTS RELIED ON I, II, AND III, AS THESE POINTS RELIED ON ARE ADDRESSED SOLELY TO THE GUNDAKER RESPONDENTS AND DO NOT PERTAIN TO THE VESCOVO RESPONDENTS.

Standard of Review

Missouri Supreme Court Rule 83.08 prohibits Appellants from raising issues in this Court not included in their court of appeals brief. Moreover, Rules 83.02 and 83.04 provide that an appellate court case may be transferred to this Court only when issues involve a question of general interest or importance, are for the purpose of re-examining existing law or the court of appeals opinion is contrary to a previous decision of an appellate court of this state. The issues raised in Points Relied On IV and V by Appellants in their Substitute Brief to this Court addressed to the Vescovo Respondents were not raised earlier as required by Rule 83.08 and do not involve issues which alone

invoke this Court's jurisdiction under Rules 83.02 and 83.04. Therefore, it is the Vescovo Respondents' position that Appellants have failed to invoke the jurisdiction of this Court as to the Vescovo Respondents under Rules 83.08, 83.02 and 83.04. Accordingly, the Vescovo Respondents respectfully request that this case be remanded to the trial court for a new trial, in accordance with the court of appeals decision affirming the trial court's judgment granting the Vescovo Respondents a new trial.

In the alternative, should this court exercise jurisdiction on transfer, the following standard of review applies. Appellate review of the grant of a motion for a new trial differs from the review of a denial of a motion for new trial in that appellate review is more liberal in upholding the grant of a new trial than the denial of a new trial. Carpenter v. Chrysler Corp., 853 S.W.2d 346, 360 (Mo. App. 1993). When the trial court grants a new trial, the court of appeals must allow every reasonable inference that favors the trial court's ruling, and may not reverse the trial court's ruling unless there has been a clear abuse of discretion. Guzman v. Hanson, 988 S.W.2d 550, 554 (Mo. App. 1999). An abuse of discretion occurs when the trial court's ruling is clearly against the logic of the circumstances then before the court, and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. Id. If reasonable people can differ about the propriety of the action taken by the trial court in granting the new trial, then the trial court did not abuse its discretion. Id.

In reviewing a trial court's award of a new trial because of an erroneous instruction, the court of appeals determines if the instruction is erroneous as a matter of law upon the record presented, not as a matter within the discretion of the trial court. Egenreither ex rel. v. Carter, 23 S.W.3d 641, 645

(Mo. App. 2000). If the instruction is found to be erroneous, the court of appeals defers to the discretion of the trial court, absent a showing of an abuse of discretion, because the trial court has the best opportunity to determine the effect of any error. Id.

The trial court did not, as Appellants contend, grant the Vescovo Respondents a new trial on an error regarding a matter of law, that is, an issue regarding the use of an incorrect jury instruction on the measure of damages. The trial court granted the Respondents a new trial, not because the choice of the damage instruction 4.03 was technically incorrect, but because 4.03 was not appropriately modified to fairly submit damages in accordance with Rule 70.02. The jury obviously considered defects in the home, other than the lack of damp-proofing, which were not submitted to them by Appellants' verdict directing instructions 7, 8, and 9 because 4.03 told the jury to award a sum representing the difference between the home's "actual value" on the date of sale and what its value would have been if "as represented." The "as represented" value was its sale price. There was evidence introduced over the Vescovo Respondents' objection that the home's "actual value" on the date of sale had been allegedly reduced by numerous alleged construction defects, in addition to the failure to damp-proof. Where there is evidence of other causes or conditions which have reduced the actual value, the damage instruction may require modification to fairly submit damages. Moore v. Woolbright, 645 S.W.2d 376, 377 (Mo. App. 1983); Moore v. Woolbright, 670 S.W.2d 190, 192 (Mo. App. 1984). Therefore the damage instruction given was misleading because it did not direct the jury, in determining "actual value," to eliminate all reductions in value other than those resulting from the failure to disclose the lack of damp-proofing.

Therefore, the court of appeals applied the appropriate standard of review and it was error to

give the damage instruction without modification.

IV. THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S ORDER GRANTING ALL RESPONDENTS A NEW TRIAL BECAUSE THE JURY'S AWARD OF \$140,000.00 IN COMPENSATORY DAMAGES SHOWED THAT THE JURY DID CONSIDER OTHER ALLEGED DEFECTS BESIDES FAILURE TO DAMP-PROOF IN THAT THE AWARD APPEARS TO APPROXIMATE THE REVISED ESTIMATE OF APPELLANTS' EXPERT FOR ALL ALLEGED DEFECTS, IN ADDITION TO THAT OF THE ALLEGED FAILURE TO DAMP-PROOF, AND THEREFORE WAS NOT SUPPORTED BY A REASONABLY RATIONAL BASIS.

Appellants argue that it is within the sound discretion of the jury to award damages and that if they are "founded on any reasonably rational basis" they will be upheld as responsive to the evidence.

However, the jury can only assess damages after they have made a finding of liability in accordance with the verdict directors. If the verdict directors call for a finding of liability based upon a particular act or omission, the jury must assess damages based upon that act or omission. Verdict directors 7, 8, and 9 against the Vescovo Respondents called for a finding of liability specifically based upon failure to disclose the lack of damp-proofing. The problem with the damage instruction given in this case is that, because it was unmodified, it did not fairly limit the jury to a finding of damages based upon failure to disclose lack of damp-proofing consistent with verdict directors 7, 8, and 9. Rather, 4.03, as given, improperly allowed the jury to consider (and the trial court and court of appeals found that it did in fact consider) evidence introduced by Appellants over objection in support of other theories of liability which were ultimately not submitted to the jury.

Appellants' assertion that the trial court's order granting a new trial should not be given deference by this court is incorrect. The new trial was granted because the trial court found that the jury considered facts which were inappropriate based on Appellants' verdict directors. Appellants' verdict directors limited the jury's consideration of damages to those proximately caused by the failure to damp-proof. The trial court is presumed correct and its ruling should only be disturbed if it involves a manifest abuse of discretion.

Appellants submitted the following version of MAI 4.03 for their damage instruction which was presented to the jury:

If you find in favor of the plaintiffs, then you must award
plaintiffs such sum as you believe was the difference
between the actual value of the house on the date it was

sold to plaintiffs and what its value would have been on that date had the house been as represented by defendant.

(L.F. 312)

It is important for this Court to note that Appellants never submitted to the jury that the Vescovo Respondents made any misrepresentations regarding the home other than that the home's foundation had been damp-proofed. Appellants urge that the Vescovo Respondents represented that there were "no code violations" and that the house was "free of defects." The code compliance representations, if any, were made by Appellants' expert, Mr. Harvey, from Webster Groves. The Appellants never pleaded nor did the evidence at trial prove that anyone asserted the house was free of defects. Missouri law does not impose an allegation on a builder-vendor to build a perfect house. Matulunas v. Baker, 569 S.W.2d 791 (Mo. App. S.D. 1978). Therefore, Appellants do not accurately set forth the measure of damages submitted in their own version of MAI 4.03, namely, the difference between the actual value of the house on the date it was sold to Appellants and what its value would have been on that date had the house been as represented by the Vescovo Respondents. It should have been the difference in value of the house with, versus without, damp-proofing.

The Vescovo Respondents do not contend that the use of some form of MAI 4.03 was incorrect in this case, but only that it was not appropriately modified. The Vescovo Respondents submitted a version of MAI 4.03 (L.F. 325) which they believed to be consistent with Appellants' verdict directing instructions 7, 8, and 9 appropriately limiting the jury's consideration of damages to those damages

flowing from the Respondents' alleged nondisclosure of their failure to damp-proof the home.

The court of appeals found that the version of MAI 4.03 submitted by Appellants and given to the jury over objection caused confusion as to evidence the jury could properly consider. It was inappropriate considering the verdict directing instructions 7, 8, and 9 used at trial, because based on the theories Appellants advanced through most of the trial, the trial court did not limit Appellants' evidence to that regarding only the failure to damp-proof. Compounding that confusion, after Appellants decided to proceed only on the issue of the home's lack of damp-proofing via verdict directors 7, 8, and 9, the court failed, over the Vescovo Respondents' objection, to limit Appellants' closing argument to damages related only to the Respondents' failure to damp-proof. Appellants' evidence and closing argument, therefore, contained many statements and other arguments about other alleged defects irrelevant to the issue of Respondents' failure to damp-proof the home's foundation and the effect those other defects had on value. This argument could have done nothing but confuse or mislead the jury. For this reason, the jury verdict for \$140,000.00 could not have been founded on a "reasonably rational basis."

Appellants argue in their Substitute Brief that under the evidence presented through their expert, Susan Schiff, the damages for diminution in value due to lack of damp-proofing alone are calculated by reducing the value of the home as represented if it had been damp-proofed, (\$560,000.00), minus \$418,421.00, the purported actual value of the home without damp-proofing. Appellants arrive at this figure by subtracting their expert Matt Foreman's estimated cost to repair the lack of damp-proofing (\$27,800.00), plus 18% for overhead and profit ($\$27,800.00 \times .18 = \$5,004.00$), plus 15% for cost overruns ($\$27,800 \times .15 = \$4,170$), totaling \$36,974.00. Appellants

then reduce the purchase price of \$560,000.00 by \$36,974.00 (\$523,026.00). Appellants' further reduce this diminution in value figure by another 20%², claiming their expert testified that an additional 10%-20% should be subtracted from the reduced value of the house to account for the "confidence" factor, arriving at \$418,421.00. Appellants argue the difference between these two figures (\$141,579.00) is very close to the jury award of \$140,000.00.

The jury award of \$140,000.00 was noted by the court of appeals in its opinion to approximate Plaintiff's expert Mr. Foreman's revised estimate of repairs for all defects, or \$134,000.00, plus 20% of that cost for overhead and profit. Mr. Foreman testified that the cost to repair the damp-proofing alone, including overhead, profit, and over-run estimates, would amount to \$36,974.00.

Appellants base their entire argument in support of the \$140,000.00 jury award as being "reasonable" by applying a 20% discount off of the \$523,026.00 which represents the sale price of the home (\$560,000.00), less the total cost to repair the damp-proofing (\$36,974.00). However, Appellant's expert, Ms. Schiff, testified that to determine the actual value of a home with a defect, one would subtract the total cost to repair that defect including profit, overhead and cost overrun factors, from the purchase price and subtract an additional amount equal to a "minimum" of 10% of the remaining value of the house, because of the "confidence" factor. Tr. 18 (Vol. III-V). In Point Relied On IV, Appellants use a percentage (20%) not in evidence because their expert had not testified to

² The 20% figure came from the mouth of Appellants' counsel, not Ms. Schiff, who testified only to a "minimum" of 10%. Tr. 18-19 (Vol. III-V).

such a percentage. Therefore it is not reasonable to assume the jury used that percentage. Assuming that it used the calculations of Appellant's expert at all, if the jury had used the percentage of 10%, as testified to by Appellant's expert, Appellants' calculations no longer support the verdict. If 10% is used, then even according to Appellants' method of figuring, the difference between the value of the home as represented with damp-proofing (\$560,000.00) and without damp-proofing (\$470,724.00) is only \$89,276.00.

The law in Missouri does not state that a prevailing Plaintiff is entitled to recover the difference between the present value of the misrepresented property with all defects and the consideration paid for that property. This is the standard the Appellants' counsel attempts to impose. This particular standard was argued by Appellants' counsel during trial. Appellants contend that the appropriate measure of damages is the difference between what was purchased and what was thought to be purchased on the date of the sale. Rather, the law is quite clear that the measure of damages is the difference between the real value as it relates to the representation, and the represented value as of the date of the sale. The only alleged representation or "concealment" by the Vescovo Respondents which Appellants' counsel chose to submit to the jury, was their representation related to damp-proofing. Appellants specifically withdrew their claim that the Vescovo Respondents had misrepresented that the house was "well-constructed", as that particular assertion could not be proven. The Appellants' damages, therefore, only involve the alleged misrepresentation regarding damp-proofing, not problems with the porch, the roof, or any other claimed imperfections.

Appellants submitted their theory of recovery to the jury based on MAI 23.05 modified by Seidel v. Gordon A. Gundaker Real Estate Co., 904 S.W.2d 357 (1995), which is a fraudulent

concealment case. The jury in the case at bar was instructed, based on Seidel, that the only relevant issue for their consideration was the Respondents' failure to disclose the lack of damp-proofing. They were also instructed that that was the only issue the Appellants had no duty to discover. Therefore, it follows that if damp-proofing is the only issue concealed and the only issue which the Appellants had no duty to discover, it is the only recoverable element of damage. Otherwise, Appellants would be allowed to avoid the general rule that a party who undertakes his own investigation is not allowed to rely on the misrepresentation of another. See Groothand v. Schleter, 949 S.W.2d 923 (Mo. App. W.D. 1997).

This case is similar to Schnuck v. Kreigshauser, 371 S.W.2d 242 (Mo. 1963). In that case, which involved fraud with respect to the sale of a house, the Plaintiff decided to proceed on a theory of misrepresentation relating to a crack in an interior wall caused by the use of green lumber. Plaintiff then sought damages for the existence of a foundational problem. However, the jury was not required to find that a foundation problem did in fact exist, that the Defendant knew of the existence of a foundation problem, or that the Defendant falsely presented that no foundation problem existed. In fact, based upon the instructions, it appeared that the Plaintiffs abandoned their evidence based upon the theory that there was a fraudulent representation concerning the condition of the foundation. This is very similar to the case at bar, where the Appellants, after six days of trial, while submitting jury instructions, abandoned their claim of misrepresentation related to the assertion by Respondents that the home was "well-constructed." The verdict directors, accordingly, did not relate to the representation that the home was "well-constructed." That claim, however, was improperly argued, over Respondents' objection, by Appellants' counsel in the closing argument of their case.

The verdict director in Schnuck isolated the evidentiary fact as to the cause of a crack in the interior partition wall. The Schnuck jury, however, was then allowed to award damages based on the loss to Plaintiffs by reason of a defective foundation, an evidentiary fact not submitted to the jury in the verdict director. In the case at bar, verdict directing instructions 7, 8, and 9 isolated the evidentiary fact regarding misrepresentation as to the lack of damp- proofing. They instructed the jury to find that if the Vescovo Respondents had superior knowledge of the lack of damp-proofing and failed to disclose this to the Appellants, then the verdict should be for Appellants. However, based on the Appellants' closing argument and the use of an overbroad and misleading damage instruction, the jury was improperly given a roving commission to award damages for other unrelated alleged defects admitted through the testimony of Matthew Foreman, Susan Schiff, and others, which were not in any way caused by that misrepresentation. As in the Schnuck case, the verdict directing instructions 7, 8, and 9 proceeded upon one theory of recovery and the damage instruction proceeded upon another.

In Schnuck, the Court found that in the event of a new trial, if the Plaintiffs were of the opinion that they had been damaged because of a fraudulent representation concerning the condition of the foundation of the house, they must submit such an issue, supported by the evidence, to the jury and have the jury find that the Defendant fraudulently represented to them that there was no foundation problem, when in fact there was. The jury was required to find that the foundation problem was known to the Defendant. The court further stated that if, however, the Plaintiffs desired to limit their case to a false representation concerning the cause of a crack in an interior wall, then the measure of their damages should likewise be so limited and would not authorize recovery of damages for a false representation concerning the condition of the foundation of the house.

The foregoing opinion is instructive as to the damages appropriately considered by the jury here. Appellants chose to submit to the jury only the issue of the representation by the Vescovo Respondents related to the failure to damp-proof the foundation of the house. They chose to submit no other representation and their damages must be limited to that submission.

The jury was not entitled to consider all latent defects which affected the value of the property up to the time of trial. They should have considered only those defects related to the Vescovo Respondents' failure to damp-proof the foundation of the house. Because the verdict of \$140,000.00 shows that the jury improperly considered evidence of other alleged defects which certainly affected their opinion of the home's value, the trial court was correct and did not abuse its discretion in granting a new trial to the Vescovo Respondents.

Because "cost to repair" is not the appropriate measure of damages in a case of this type, Appellants actually failed to make a submissible case as to damages and it was error for the trial court to submit that issue to the jury. See Maples v. Charles Burt Realtor, Inc., 690 S.W.2d 202 (Mo. App. S.D. 1985), (where the court remanded a case for re-trial when Plaintiff's only evidence of damages was the cost to repair a home). In the case at bar, Appellants introduced no evidence of the difference between value of the home at the time of sale without damp-proofing and the home's value had it been damp-proofed. All testimony by Appellants' witnesses regarding the value of the home was based on its value with all the alleged defects, not just lack of damp-proofing.

Essentially, the Appellants argue that the damages they are entitled to are represented by the

difference between the sale price of the home and the value of the home on the date of the trial³. This is not the issue on which the jury was instructed. This assertion does not reflect the appropriate measure of damages. The appropriate measure for damages in a misrepresentation case is the difference between the actual value of the property at the time of the making of the contract and the value that it would have possessed if the representation had been true. See Wassen v. Schubert, 964 S.W.2d 520 (Mo. App. W.D. 1998).

An overbroad version of MAI 4.03 was submitted to the jury. The jury was obviously confused as to the measure of damages based on the evidence admitted by the trial court. The arguments of Appellants' counsel referring to other alleged defects attempted to persuade the jury that unrelated code violations and other alleged problems were a reasonable and probable consequence of Respondents' "failure to disclose the fact that the foundation had not been damp-proofed".

Under Missouri law, damages are measured at the time of the transaction. See Little v. Morris, 967 S.W.2d 685 (Mo. 1998). Issues such as the restructuring and repair of the front porches were not issues at the time of the sale and, therefore, cannot properly be considered issues of damage under Missouri law. Similarly, the repainting of the entire interior of the home was not an issue at the time of the sale. Finally, one of the issues presented to the jury in this case was whether Tyvek, a house wrap, should have been used on this home. Appellants chose not to submit to the jury that the failure

³ The only credible evidence of fair market value came after trial of this cause when the "house of toothpicks" was sold for \$620,000.00. (See Appendix A1-2).

to disclose that the house did not have Tyvek caused any damages to the Appellants. In fact, their expert, Susan Schiff, testified that in her numerous years of experience in selling real estate, no buyer had ever asked her about the existence of Tyvek. She had never seen it raised as an issue of cost or value with respect to property.

Mr. Foreman's report seeks damages for the installation of access to a crawl space in the amount of One Thousand Dollars (\$1,000.00). The fact that there was no access to the crawl space was pointed out to the Lowdermilks in the inspections performed on the home. However, that issue was removed from the jury's consideration. The only "defect" that the jury was required to find that the Lowdermilks could not have discovered was the issue of damp-proofing. The only issue related to discovery is damp-proofing. The only issue for purposes of damages is the cost to accomplish the damp-proofing.

Similarly, with respect to the claimed damages for installation of roofing felt, Susan Schiff, Plaintiffs' expert, testified that in her experience, the only time the issue of felt was raised was when an inspector had pointed out that a home in Webster Groves did not have adequate roofing felt. Again, the jury was not required to look at the issue of whether the existence of roofing felt was discoverable in the exercise of ordinary care by the Lowdermilks. The only issue submitted to the jury was whether the Lowdermilks knew or could have known about the failure to damp-proof. The only issue of concealment submitted to the jury was whether the Vescovo Respondents negligently concealed the fact that the home was not damp-proofed. The Appellants also fail to mention that there was never a water leak or seepage in the foundation.

That Appellants should not suffer or bear the loss associated with the alleged presence of other

code violations and defects does not speak to their submission to the jury regarding proximate cause due to failure to disclose lack of damp-proofing. Rather, this argument speaks to those defects and representations that Appellants' counsel was able to prove at trial and submit to the jury and those she was not. The only issue Appellants adequately proved and subsequently submitted to the jury was the issue of the Vescovo Respondents' failure to damp-proof the foundation of the home and their subsequent failure to disclose this fact to Appellants. Appellants did not properly limit their damage instruction to this issue. Therefore, the jury inappropriately and improperly considered evidence related to alleged defects in the home other than the lack of damp-proofing when determining the actual value of the house. Due to this impropriety which prejudiced Respondents, the trial court did not abuse its discretion in granting a new trial to the Vescovo Respondents.

Because Appellants were proceeding on numerous theories at trial, evidence regarding alleged defects in the construction of the home, other than the failure to damp-proof the foundation, were allowed into evidence. However, all evidence other than failure to damp-proof was irrelevant and prejudicial to Respondents because the only issue before the jury was Respondents' failure to damp-proof the foundation. The effect of this evidence was to introduce to the jury information and opinions regarding alleged defects in the home which were wholly unrelated to the single issue before the jury. The introduction of this evidence, despite the specific verdict director given to the jury, could have done nothing but confuse the jury. Hence, the trial court properly granted Respondents' Motion for a New Trial.

Appellants' assertion that there is no evidence that the jury did not follow the trial court's

instruction is unlikely when three days of a six day trial consisted of nothing but evidence regarding alleged defects unrelated to the Vescovo Respondents' failure to damp-proof the foundation of Appellants' home.

Appellants correctly state that the amount of an award of damages, when a jury is properly instructed, rests within the jury's sound discretion. Ralph v. Lewis Brother Bakeries, Inc., 979 S.W.2d 509 (Mo. App. 1998). However, a jury's award of damages must be founded on a "reasonably rational basis." Parker v. Pine 617 S.W.2d 536, 541 (Mo. App. 1981). Clearly, considering the verdict directing instruction, the jury's \$140,000.00 award to Appellants for compensatory damages cannot have been founded on a reasonably rational basis. Evidence adduced, even from Appellants' expert Mr. Foreman, regarding unrelated damages and the changes made over time to his "cost to repair", is equivocal. Mr. Foreman prepared a Schedule of Damages on October 31, 1999, containing One Hundred Thirteen Thousand Seven Hundred Fifty-Eight Dollars (\$113,758.00) in actual damages for cost of all repairs that he believed necessary. He submitted an Amended Schedule on April 22, 2000, and a Re-Amended Schedule at the time of trial in which he increased the cost of repairs to \$182,800.00. The Schedule of Damages consisted of numerous items which were not related to the foundational excavation for application of damp-proofing, including the building of porches, painting the entire interior of the home, tearing off and re-roofing the house. His October 31, 1999, estimate for foundational excavation and application of damp-proofing was Fifteen Thousand Dollars (\$15,000.00). Foreman then increased that figure to Twenty-Seven Thousand Eight Hundred Dollars (\$27,800.00) immediately prior to trial.

It must be presumed that the jury was confused, despite the verdict directors, regarding the

issues it could consider in awarding damages. Appellants cite Parker v. Pine, 617 S.W.2d 536 (Mo. App. 1981), for the proposition that the court cannot assume the jury ignored the instructions given or made a mistake in weighing the evidence without some proof to support this claim. The fact that the verdict directors and damage instruction were inconsistent is alone sufficient grounds to assume the jury could not have followed both, and therefore the trial court correctly sustained the new trial motion.

Appellants help make the Vescovo Respondents' case when they cite all of the evidence heard by the jury regarding alleged defects other than the lack of damp-proofing. It is impossible for the jury to have disregarded all of this evidence and follow the trial court's instructions. The jury was not entitled to consider evidence of additional defects in the house to determine the home's value without damp-proofing. The verdict directors strictly prohibited such consideration.

Appellants are correct in their citation of the definition of fair market value based on MAI 16.02. Fair market value of the home at the time of the sale was \$560,000.00 minus the cost of damp-proofing. Appellants were unable to prove their case regarding other alleged defects, so the jury was not asked to consider them. The jury's award in this case of \$140,000.00 is clearly not supported by the evidence nor established on any reasonably rational basis.

Based on the clear error involved in allowing the jury to consider evidence of other alleged defects over the Vescovo Respondents' objection, which had nothing to do with the Vescovo Respondents' failure to damp-proof the home's foundation, in allowing Appellants to argue those other defects in closing over objection and the impact that evidence and argument had on the jury's award of damages, the court of appeals correctly found the trial court did not abuse its discretion nor

misapply the law in granting Respondents a new trial based on the inconsistency of the instructions.

Therefore, this Court should affirm the court of appeals' opinion.

V. THE COURT OF APPEALS CORRECTLY AFFIRMED

THE TRIAL COURT'S ORDER SUSTAINING THE VESCOVO RESPONDENTS' MOTION FOR NEW TRIAL ON THE GROUND THAT APPELLANTS' DAMAGE INSTRUCTION IMPROPERLY ALLOWED THE JURY TO CONSIDER OTHER CLAIMED DEFECTS WHICH WERE NOT SUBMITTED BY APPELLANTS IN VERDICT DIRECTING INSTRUCTIONS 7, 8, AND 9 WHICH LIMITED THE JURY'S CONSIDERATION TO ONLY THOSE DAMAGES CAUSED BY THE FAILURE TO DAMP-PROOF. WHETHER OR NOT THE VESCOVO RESPONDENTS PURPORTEDLY "ACCEPTED RESPONSIBILITY" FOR TWO ADDITIONAL CODE VIOLATIONS AND A SLOPING PORCH IS IRRELEVANT FOR THE REASON THAT THESE OTHER ALLEGED DEFECTS WERE NOT SUBMITTED IN APPELLANTS' VERDICT DIRECTORS 7, 8, AND 9 AND THUS WERE OUTSIDE THE PROVINCE OF THE JURY'S CONSIDERATION.

It is clear that the jury considered evidence of alleged defects other than that of the Vescovo Respondents' failure to damp-proof the foundation of the home. Because Appellants initially proceeded under several theories of recovery one half of the six day trial consisted of nothing but

evidence regarding other alleged defects in the home. Appellants were allowed to argue in their closing argument the existence of these other alleged problems. After the trial court overruled Respondents' objections to the admission of this evidence, and assuming all of Appellants' theories of recovery would be considered by the jury, the Vescovo Respondents necessarily put on their own evidence regarding these alleged problems to rebut Appellants' evidence.

The Vescovo Respondents agree that Appellants correctly cite Missouri law which requires objection to evidence and argument at the time of trial in order to preserve the issue for appeal.

It is clear that all Respondents preserved their arguments for this Court's review of the trial courts' admission of the improper evidence. The timely objections of Respondents as revealed in the transcript are as follows:

1. Appellants' case originally contained allegations that the Vescovo Respondents had, prior to Appellants' purchase of the home, assured Appellants' that the home was "well constructed";
2. Appellants, however, withdrew this claim and decided not to present this claim to the jury. This withdrawal is evidenced by the verdict director chosen by Appellants wherein the only issue to be decided by the jury was whether or not the Vescovo Respondents failed to inform Appellants that they had not damp-proofed the foundation of the 118 Glen Road home;
3. Respondents objected to the admission of evidence regarding defects other than

the failure to damp-proof during the Appellants' case, just before the testimony of Matthew Foreman, Appellants' expert architect; and

4. Further, the Vescovo Respondents offered a modification of MAI 4.03, the damage instruction, which better informed the jury in light of the verdict director, how Appellants' damages should be calculated. This version of MAI 4.03 was improperly refused by the trial court. Appellants version gave the jury a roving commission because Appellants' damage instruction did not conform to the Appellant's verdict directors.

Finally, all Respondents objected to the portion of Appellants' closing argument in which they argued to the jury the evidence of the other alleged defects and the impact these had on the home's value. The trial court overruled these objections. Appellants argued, that all of these problems might be the responsibility of the Vescovo Respondents, and argued their position on the cost to repair all of these problems and their impact on the home's value. The rebuttal arguments by the Vescovo Respondents do not concede any of the Appellants' allegations since timely objections were made during the trial.

Appellants disregard the fact that Respondents timely objected to evidence and to the portions of Appellants' closing arguments which related to alleged defects in the home other than the failure to damp-proof the foundation. Therefore, the jury improperly heard and considered evidence of these other defects. Further, Respondents offered a correct, more instructive, modification of MAI 4.03, which was improperly refused by the trial court.

Despite the Vescovo Respondents' purported "acceptance of responsibility" of other alleged defects, as proposed in Appellants' Substitute Brief, the fact remains that the jury's province was limited by the verdict directors to consideration of damages caused solely for alleged failure to disclose the lack of damp-proofing. The jury is bound to follow the court's instructions even if it requires the jury to ignore specific argument of counsel in conflict. Rains v. Herrell, 950 S.W.2d 585 (Mo. App. S.D. 1997). Accordingly, the court of appeals correctly held it was not an abuse of the trial court's discretion to grant Respondents' Motion for a New Trial. Bodimer v. Ryan's Family Steakhouses, Inc., 978 S.W.2d 4 (Mo. App. E.D. 1998). The court of appeals' decision affirming the trial court's order sustaining Respondents' Motion for a New Trial should be affirmed by this Court.

VI. APPELLANTS HAVE FAILED TO INVOKE THE JURISDICTION OF THIS COURT AS TO THE VESCOVO RESPONDENTS BECAUSE THEIR POINTS RELIED ON IV AND V ALTER THE BASIS OF CLAIMS RAISED IN

THEIR COURT OF APPEALS BRIEF IN VIOLATION OF
RULE 83.08 IN THAT APPELLANTS DID NOT RAISE
“REASONABLENESS” OF THE VERDICT NOR
“ACCEPTANCE OF RESPONSIBILITY” FOR OTHER
ALLEGED DEFECTS IN THAT BRIEF.

FURTHERMORE, THESE ISSUES DO NOT MEET THE
TRANSFER REQUIREMENTS OF RULES 83.02 AND
83.04 BECAUSE THEY DO NOT INVOLVE QUESTIONS
OF GENERAL INTEREST OR IMPORTANCE, ARE NOT
FOR THE PURPOSE OF RE-EXAMINING EXISTING
LAW AND THE COURT OF APPEALS OPINION
GRANTING THE VESCOVO RESPONDENTS A NEW
TRIAL IS NOT CONTRARY TO A PREVIOUS DECISION
OF AN APPELLATE COURT OF THIS STATE.

The Vescovo Respondents respectfully contest the jurisdiction of this Court to review the issues raised by Appellants in Points Relied On IV and V of their Substitute Brief which are addressed to the Vescovo Respondents because Appellants did not raise these issues in their court of appeals brief as required by Rule 83.08. Appellants did not raise “reasonableness” of the verdict (Point Relied On IV), nor “acceptance of responsibility” for other alleged defects (Point Relied On V) in the court of appeals. Appellants may not alter the basis of claims raised in the court of appeals under Rule

83.08 by raising them on transfer. Linzenni v. Hoffman, 937 S.W.2d 723 (Mo. banc 1997).

Appellants have further failed to invoke the jurisdiction of this Court to review the court of appeals decision as to the Vescovo Respondents because these issues do not involve the grounds for transfer set forth in Rules 83.02 and 83.04. These rules provide that a transfer may be ordered when issues in a case involve a question of general interest or importance, are for the purpose of re-examining existing law or the court of appeals opinion is contrary to a previous decision of an appellate court of this state.

Sections 339.710-339.860 apply to realtors, not to builders. Appellants' assertion in their Substitute Brief that this Court transferred this case "to determine issues of general interest and importance related to the legislature's enactment of Missouri Revised Statutes §§339.710 - 339.860" expressly shows that Appellants requested transfer to have this court review issues pertaining to Gundaker, not Vescovo. The three issues raised in Appellants' Suggestions in support of their Application for Transfer affect only the Gundaker Respondents. Whether Sections 339.710-339.860 provide a private cause of action, whether a negligence per se claim is permitted for purely economic loss, and whether a cause of action for negligent omission exists in Missouri each relate solely to the Gundaker Respondents. The Vescovo Respondents are not mentioned in Appellants' Application to Transfer.

Points Relied On IV and V of Appellants' Substitute Brief, (the only Points Relied On addressed to the Vescovo Respondents), do not involve issues which would invoke this Court's jurisdiction. The only issues addressed to the Vescovo Respondents in Appellants' Substitute Brief are whether the jury's award was reasonable (Point Relied On IV) and whether they "accepted

responsibility” for other alleged defects (Point Relied on V). Neither issue is of general interest or importance, nor needs re-examination of existing law. There is no court of appeals decision on these issues contrary to a previous appellate court decision because these issues were not raised in the court of appeals. These issues cannot now be raised on transfer because Rule 83.08 requires that the party requesting transfer not alter the basis of any claim raised in the court of appeals.

The trial court sustained the Vescovo Respondents’ Motion for a New Trial on the grounds that Plaintiff’s verdict directors 7, 8, and 9 limited the jury to finding whether or not the Vescovo Respondents failed to disclose that the exterior of the foundation had not been damp-proofed, and whether or not, as a direct result of such failure, Plaintiffs were damaged. (L.F. 423). Finding that the jury was “allowed to consider other claimed defects in the home, the existence of which were not submitted by Plaintiffs verdict directing instructions,” the trial court sustained the Vescovo Respondents’ new trial motion. (L.F. 423-4).

In Part I of its opinion, the court of appeals affirmed the trial court’s order sustaining the Vescovo Respondents’ Motion for New Trial. Although Appellants’ verdict directing instructions 7, 8, and 9 limited the jury to finding whether or not Vescovo Respondents’ actions amounted to “the failure to disclose the failure to damp-proof,” Plaintiffs’ damage instruction (MAI 4.03) used over Vescovo’s objection was found to be misleading because “... Plaintiff’s damage instruction did not direct the jury, in determining ‘actual value,’ to eliminate all reductions in value other than those resulting from the failure to disclose the lack of damp-proofing.” Thus Appellants’ version of 4.03 failed to limit the jury’s consideration of damages to those damages caused by failure to disclose that the foundation had not been damp-proofed. Therefore, the court of appeals found it was error to give

Appellants' damage instruction without modification and that the Vescovo Respondents were prejudiced by the failure to appropriately modify it. The court of appeals held that the trial court did not abuse its discretion nor misapply the law in granting a new trial because the jury was allowed to consider improper damage evidence.

Part II of the court of appeals opinion discussing negligence per se as it applied to the Gundaker Respondents does not pertain to the Vescovo Respondents.

Appellants seek this Court's review of Points Relied On IV and V without satisfying the jurisdictional requirements that the issues be previously raised in the court of appeals and in addition be of general interest or importance, for the purpose of re-examining existing law or because the court of appeals opinion is contrary to a previous appellate decision. Accordingly, the Vescovo Respondents contend that this court is without jurisdiction to consider the issues raised in the Points Relied On IV and V and request that this transfer be dismissed.

VII. THE COURT SHOULD DISMISS THIS TRANSFER BECAUSE APPELLANTS' CAUSE OF ACTION IS MOOT, IN THAT THEY SOLD THE HOUSE FOR \$60,000.00 MORE THAN THE PURCHASE PRICE, SO APPELLANTS SEEK A JUDGMENT UPON A MATTER WHICH, IF A JUDGMENT WERE RENDERED, WOULD NOT HAVE ANY EFFECT UPON ANY THEN EXISTING

CONTROVERSY AND ANY JUDGMENT RENDERED
WOULD BE A HYPOTHETICAL OPINION.

The Appellants sold the home at 118 Glen Road on or about August 16, 2001, for the sale price of \$620,000.00, a profit of \$60,000.00 over the original purchase price of \$560,000.00. (See Appendix A1-2). This sale for a profit causes all the issues in this case to become moot.

Courts in Missouri have determined that issues that are moot are not subject to consideration on appeal. State ex rel. Missouri Cable Television Association v. Missouri Public Service Commission, 917 S.W.2d 650 (Mo. App. W.D. 1996). “A cause of action is moot when the question presented for decision seeks a judgment upon some matter which, if the judgment was rendered, would not have any practical effect upon any existing controversy.” Reed v. Reardon, 41 S.W.3d 470, 472 (Mo. 2001), citing Shelton v. Farr, 996 S.W.2d 541 (Mo. App. 1999). Further, “when an event occurs that makes granting effectual relief by the court impossible, this case is moot and should be dismissed.” Reed, 415 S.W.3d at 471. Also, this court may not render advisory opinions when an issue is moot. Citizens Safe Waste Management v. St. Louis County Air Pollution, 896 S.W.2d 643 (Mo. App. W.D. 1995).

When deciding if a case is moot, this Court may consider evidence outside the record. Bratton v. Mitchell, 979 S.W.2d 232 (Mo. App. W.D. 1998). A case can be mooted by an intervening event that “so alters the position of the parties that any judgment rendered merely becomes a hypothetical opinion.” Reed, 415 S.W.3d at 471.

The sale of the home at 118 Glen Road for a price of \$620,000.00 represents a \$60,000.00

profit. Therefore, Appellants have not been damaged. The effect, if any, of the Vescovo Respondents' alleged failure to disclose the home's lack of damp-proofing is non-existent. Appellants suffered no damage and their claim is moot. Accordingly, this Court's review is unnecessary and this transfer should be dismissed.

CONCLUSION

The issues raised by Appellants as to the Vescovo Respondents do not invoke this Court's jurisdiction under Rules 83.08, 83.02 and 83.04. Alternatively, the court of appeals correctly affirmed the trial court which appropriately granted the Vescovo Respondents' Motion for a New Trial. The court of appeals found the jury was subjected to a great deal of irrelevant evidence not properly considered by them. The jury was ultimately instructed to decide only one issue, whether the Vescovo Respondents failed to inform Appellants that the foundation of the home had not been damp-proofed. The jury was sworn to award only those damages proximately caused by failure to damp-

proof. The Vescovo Respondents' timely objection to the admissibility of all other irrelevant and prejudicial evidence of other alleged defects was overruled. The trial court gave the jury a damage instruction (a form of MAI 4.03 offered by Appellants over the Vescovo Respondents' objection) which was not consistent with the narrow issue described in verdict directors 7, 8, and 9. The trial court's instructions, therefore, created a substantial potential for a prejudicial effect on the Vescovo Respondents. The court of appeals agreed with the trial court that the jury had been confused by unrelated evidence combined with the inconsistent instructions and that the Vescovo Respondents were thereby prejudiced. The court of appeals agreed that the jury awarded Appellants an amount of damages not supported by the properly considered evidence and not consistent with the court's instructions.

The court of appeals correctly held that the trial court did not abuse its discretion nor misapply the law in granting the Vescovo Respondents a new trial on the grounds that the jury was allowed to consider improper damage evidence. The court of appeals decision affirming the trial court's order sustaining the Vescovo Respondents' Motion for a New Trial should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was hand-delivered this ____ day of _____, 2002,
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RULE 84.06 (c) AND (g) CERTIFICATE

Comes now counsel for the Vescovo Respondents and certifies, pursuant to Missouri Rule of Civil Procedure 84.06(c), that she has complied with the limitations contained in Missouri Rule of Civil Procedure 84.06 and that this brief contains 12,156 words. Counsel for the Vescovo Respondents also certifies, pursuant to Missouri Rule of Civil Procedure 84.06(g) that she has filed, contemporaneously with this brief, a floppy disk containing this brief. Counsel for the Vescovo Respondents further certifies that this disk has been scanned for viruses and is virus-free.

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